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No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CARPENTERS' LOCAL UNION NO. 1478,
Petitioner,

vs.

NEAL STEVENS,
Respondent.

NEAL STEVENS,
Respondent,

vs.

CARPENTERS' LOCAL UNION NO. 1478;
SOUTHERN CALIFORNIA CONFERENCE
OF CARPENTERS,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED.

1. Did the Court of Appeals misinterpret this Court's decision in *Jim McNeff v. Todd*, ____ U.S. ____, 103 S. Ct. 1753 (1983) by holding that the enforcement of accrued monetary obligations arising from a prehire agreement confers representational rights upon a union?

2. Whether the resolution of representational questions is necessary in a Section 301 action for accrued money damages where liability is predicated on an alter ego relationship between two employers.

LIST OF PARTIES TO PROCEEDING BELOW.

Pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted:

The caption of the within matter contains a listing of the names of all parties in the proceeding below which was numbered Case Numbers 83-6144 and 83-6145 in the United States Court of Appeals for the Ninth Circuit.

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CARPENTERS' LOCAL UNION NO. 1478;
SOUTHERN CALIFORNIA CONFERENCE
OF CARPENTERS,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Carpenters' Local Union No. 1478 and Southern California Conference of Carpenters, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which was entered in this proceeding on August 1, 1984 and modified on Oct. 4, 1984.

OPINIONS AND ORDERS BELOW.

The judgment and opinion of the panel of the United States Court of Appeals for the Ninth Circuit, which was entered in this matter on August 1, 1984, is styled, *Carpenters' Local Union No. 1478 v. Neal Stevens*, and although certified for publication is not yet officially reported. It appears as Appendix A.

The judgment and modified opinion of the panel of the United States Court of Appeals for the Ninth Circuit, which was entered in this matter on October 4, 1984, appears as Appendix B.

JURISDICTION OF THE SUPREME COURT.

The judgment and opinion of the panel of the United States Court of Appeals for the Ninth Circuit was entered on August 1, 1984. The petition for rehearing and suggestion of rehearing *en banc* was denied on October 4, 1984.

The United States Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE.

Statement of Facts.

Neal Stevens Contracting ("NSC") executed a Memorandum Agreement with the Southern California Conference of Carpenters ("Conference") on November 19, 1980, which obligated NSC to comply with all the terms and conditions of the 1980-1983 Carpenters' Master Labor Agreement. Pursuant to Paragraph 5(d) of the Memorandum Agreement, the parties agreed to submit disputes to arbitration.

On March 2, 1982, Carpenters' Local Union No. 1478 ("Union"), an affiliate of the Conference, filed a grievance against NSC in which the Union sought monetary

damages for lost wages, unpaid fringe benefit contributions, dues and initiation fees. The grievance alleged, *inter alia,* that NSC violated provisions of the collective bargaining agreement through its operation of a second entity, E.O.S., owned and managed by Neal Stevens and his wife.

The Union contended that NSC was responsible for the business activities of E.O.S. as the result of an alter ego, single employer and/or joint venture relationship between the two companies.

The Union prevailed at the arbitration and obtained an award granting monetary relief.

Proceedings Below.

In response to the Union's grievance against NSC, E.O.S. filed a petition seeking an election with the National Labor Relations Board ("Board") on April 2, 1982. On April 9, 1982, the Conference disclaimed any interest in representing the employees of E.O.S.

Despite the Conference's disclaimer of interest, a hearing was conducted on June 16, 1982, regarding E.O.S.'s Petition for Election. On or about September 22, 1982, the Regional Director issued a Decision and Direction of Election.

The Union's grievance was heard on August 13, 1982, and September 28, 1982. The arbitrator's decision was rendered on February 18, 1983.

The Union filed a Petition to Confirm the award on or about April 22, 1983. NSC filed a Complaint to Vacate the Arbitration Award on May 13, 1983. The District Court granted the Union's petition to confirm the arbitration award and denied NSC's Motion for Summary Judgment on July 14, 1983.

NSC appealed from the judgment to the United States Court of Appeals for the Ninth Circuit. On August 1, 1984, a divided three-judge panel of the Court of Appeals entered its judgment and opinion in this case, *Carpenters' Local Union No. 1478 v. Neal Stevens.* The majority panel reversed the District Court.

On or about August 14, 1984, the Union and the Conference filed a petition for rehearing and rehearing *en banc.* On October 4, 1984, the Court of Appeals denied the petition for rehearing and suggestion of rehearing *en banc.*

The Decisions of the Regional Director, Arbitrator, District Court and Court of Appeals Below.

The Regional Director found that the Union attempted to bind E.O.S. to the collective bargaining agreement executed by NSC by filing the grievance against NSC. In order to determine the appropriate unit for the election, the hearing officer conducted a perfunctory inquiry into whether NSC and E.O.S. constituted alter egos. The Regional Director found that no alter ego relationship existed and directed an election for E.O.S.'s employees.

The arbitrator at the grievance procedure found that NSC and E.O.S. were alter egos, single employers and/or joint venturers and awarded monetary damages to the Union for NSC's violation of several provisions of its collective bargaining agreement.

The District Court held that the adjudication of the grievance did not require a bargaining unit determination. The Court concluded that the arbitrator was not required to give preclusive effect to the Regional Director's findings. Because the District Court found that the arbitrator's award drew its essence from the collective bargaining agreement, it confirmed the arbitration award.

The Court of Appeals disagreed with the District Court. Speaking for the majority panel of the Court of Appeals, Judge Sneed held that the lower court erred in confirming the award because the arbitrator did not have jurisdiction to determine whether the pre-hire agreement signed by NSC had been breached. The Court of Appeals reasoned that the arbitrator did not have jurisdiction to adjudicate the contractual dispute because a resolution of the alleged breach necessarily affected the representational rights of the employees of E.O.S. Implicit in the decision is the holding that the arbitrator gave insufficient deference to the Regional Director's finding that NSC and E.O.S. were not alter egos.

REASONS FOR GRANTING THE WRIT.

Introduction.

This Court, in *Jim McNeff v. Todd*, _____ U.S. _____, 103 S. Ct. 1753 (1983), has held that a union obtains no representational rights from the execution or enforcement of a prehire agreement entered into pursuant to Section 8(f), 29 U.S.C. § 158(f). The Court of Appeals, however, found that representational rights are obtained through the enforcement of a prehire agreement. The Court of Appeals determined that allowing an arbitrator to bind a non-signator to a prehire agreement would infringe upon the representational rights of the nonunion entity's employees.

The decision of the Court of Appeals also conflicts with decisions in two other circuits. In *Metropolitan Detroit Bricklayers District Council, International Union of Bricklayers v. J.E. Hoetger and Co.*, 672 F.2d 580 (6th Cir. 1982), the United States Court of Appeals for the Sixth Circuit held that no preclusive effect should be given to joint employer findings of the Board by a district court in

a Section 301 action because different legal issues were adjudicated in the two forums.

In *Penntech Papers, Inc. v. NLRB,* 706 F.2d 18 (1st Cir. 1983), the United States Court of Appeals for the First Circuit refused to set aside a Board determination of single employer which conflicted with a prior finding by the district court because of a lack of identity of issues before the two tribunals.

The decision of the Court of Appeals in the instant case is in square conflict with the decisions of this Court, and the decisions of the First and Sixth Circuits. Because of the increased use of "double-breasted" operations and union attempts to discourage the practice, the issue will surely arise elsewhere. *See, Carpenters' Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d 480 (5th Cir. 1982), *cert. denied* _____ U.S. _____ (1983).

In order to resolve the conflict between the Ninth Circuit, this Court and the First and Sixth Circuits, and to avert the wider conflict that will likely arise as a result of these inconsistent decisions, it is necessary for review and resolution by this Court.

ARGUMENT

The Decision Below Conflicts With This Court's Decision in *Jim McNeff v. Todd,* _____ U.S. _____, 103 S. Ct. 1753 (1983).

The critical inquiry before the Court of Appeals was: does the execution and enforcement of a prehire agreement confer representational rights upon a union? That was the same question presented to this Court in *Jim McNeff v. Todd, supra.* The Court of Appeals and this Court are in conflict on the answer to this question and this conflict requires prompt resolution by this Court.

In *Jim McNeff*, this Court held that a union obtains no representational rights from either the execution or enforcement of a prehire agreement. Addressing this point, this Court stated, at Page 1758, that:

> Union enforcement by way of a Section 301 suit, of monetary obligations incurred by an employer under a prehire contract prior to its repudiation does not impair the right of employees to select their own bargaining agent.

The Court reasoned that the employees' representational rights are not impaired because a union obtains no representational rights in a Section 301 action in which only the enforcement of monetary obligations is sought. The Court stated, at Page 1758:

> . . . enforcement of accured obligations in a Section 301 suit does not mean that the union represents a majority of the employer's employees. . . *There is no sense in which respondents' contract action has a recognitional purpose like that forbidden in Higdon.* [Emphasis added.]

The Court of Appeals decided, nevertheless, that the enforcement of an admittedly valid prehire agreement between the Union and NSC should have been undertaken by the Board to protect the representational rights of E.O.S.'s employees. The Court of Appeals reasoned that because the Board has primary jurisdiction to protect representational rights and adjudicate representational disputes, the arbitrator had no authority to resolve the Union's contractual claim which arose from the breach of a prehire agreement.

The Court of Appeals has, thus, ignored *Jim McNeff* by holding that the resolution of a contractual claim for accrued obligations violates the representational rights of

the second entity's employees. The *McNeff* decision dictates, however, that a union can enforce accrued obligations of a prehire agreement because the union obtains no representational rights *vis a vis* the contractor's employees. Consequently, a union may, *pari-passu*, enforce a prehire agreement where liability is predicated on a single employer relationship with a second entity, because the enforcement of accrued obligations does not give the union representational rights *vis a vis* the second entity's employees.

The United States Court of Appeals for the Ninth Circuit had occasion to apply these principles in a Section 301 action where liability was predicated, as here, on a single employer relationship between a signatory and non-signatory employer. *Roberts v. Ayala*, 79 F.2d 520 (9th Cir. 1983). The *Ayala* court affirmed a judgment in which the non-signatory entity was bound to a union contract as a "single employer". The Court of Appeals upheld the district court's assumption of jurisdiction over the dispute finding that the dispute raised no representational questions. The Court found that the union was simply enforcing a prehire agreement which gave the union no representational rights.

The published opinion issued below is contrary to the language, policy, and intent of this Court's *Jim McNeff* decision. Consequently, the Court of Appeal's conclusion that representational rights emanate from the enforcement of a prehire agreement was wrong. This error requires prompt review and reversal by this Court.

The Decision Below Conflicts With the Decisions of the United States Courts of Appeals for the First and Sixth Circuits in *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983) and *Metropolitan Detroit Bricklayers District Council, International Union of Bricklayers v. J. E. Hoetger and Co.*, 672 F.2d 580 (6th Cir. 1982).

The pivotal question before the Court of Appeals was: whether an identity of issues existed between the Section 9 election proceeding in which the Regional Director of the National Labor Relations Board ("Board") determined that no alter ego relationship existed and the Section 301 action in which an arbitrator concluded that such a relationship existed. The Court of Appeals answered in the affirmative, finding that because the Union sought to bind a non-signatory company to a collective bargaining agreement to enforce accrued contract rights, the resolution of representational questions was necessary. That was the same question presented to the United States Court of Appeals for the First Circuit in *Penntech*. The Court of Appeals for the Ninth and First Circuits are in conflict in the answer to this question and this conflict requires prompt resolution by this Court.

In *Penntech*, the Circuit Court refused to set aside a Board determination of single employer which conflicted with a prior finding by the district court. The Appellate Court's decision was premised on the absence of an identity of issues before the Board and the district court; the court action involved a petition to compel arbitration whereas the Board adjudication involved the commission of an unfair labor practice.

The *Penntech* Court emphasized the rights and obligations which would result from an adjudication as determinative of whether the issues presented in two actions are the same. Citing *NLRB v. Burns Security Services, Inc.*,

406 U.S. 273 (1972), the court distinguished bargaining rights and duties such as the duty to bargain, from contractual rights and duties such as the duty to honor specific contractual obligations embodied in a contract.

The United States Court of Appeals for the Sixth Circuit reached the same conclusion in *Metropolitan Detroit Bricklayers District Council, International Union of Bricklayers v. J. E. Hoetger and Co.*, 672 F.2d 580 (6th Cir. 1982), because the issues before the Board differed from those before the district court.

The Bricklayers Union in *Hoetger, supra*, brought a Section 301 action against Hoetger seeking damages caused by the failure of Hoetger's subcontractor to make fringe benefit contributions. The subcontractor was signatory to a bargaining agreement although Hoetger was not. The union relied on a finding by the Board that Hoetger and the subcontractor were joint employers in an attempt to prove to the court that Hoetger was bound to the bargaining agreement.

The Board's finding of joint employer was made in an unfair labor practice proceeding in which Hoetger alleged that the union had engaged in illegal secondary activity in violation of Section 8(b)(4) by picketing Hoetger. The Board found that no Section 8(b)(4) violation was committed because Hoetger and the subcontractor were joint employers. The union requested the Appellate Court to give preclusive effect to this joint employer finding. The Sixth Circuit refused, because the Board had adjudicated a different legal issue from that before the district court.

The Court of Appeals found that the issue before the Board was whether the union violated a neutral employer's right not to be enmeshed in another company's labor dispute. The Court determined that the issues presented in such an action differed from those in the

Section 301 suit where the union sought contractual damages for breach of its bargaining agreement.[1]

The decision below, however, concluded that the resolution of a representational question and a contractual dispute resolved the same rights and obligations and, therefore, gave preclusive effect to the findings of the Regional Director. The Court held that the Union's contractual claim could not be adjudicated without a resolution of the representational question. Consequently, the court found the requisite identity of issues on the basis that both the Section 9 claim and the Section 301 claim required adjudication of representational questions.[2]

The view of the Court of Appeals, that representational questions are among the issues necessary to resolve a Section 301 money claim predicated on an alter ego relationship between two ostensibly separate employers, is in direct conflict with the view of the First and Sixth Circuit Courts of Appeal.

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[1]The United States Court of Appeals for the Ninth Circuit has already acknowledged in *Roberts v. Ayala*, 709 F.2d 520 9th Cir. 1983), that the resolution of Section 9 representational rights and contract rights under Section 301 of the Act give rise to different legal issues.

[2]"The decisions of the Regional Director and the arbitrator are patently inconsistent. To avoid this conclusion, the Union argues that the arbitration award rests on a contractual basis. It is here that the importance of the aforementioned Paragraph 9 emerges. The Union maintains that it merely seeks contractual damages for NSC's breach of the labor agreement. It does not seek to *represent* the employees of EOS or to *bind* EOS to a labor agreement. This contention ignores the fact that the arbitrator explicitly based the award on the conclusion that EOS was bound by the labor agreement. Moreover, the failure to pay union wages and benefits with respect to EOS employees is wrongful only if the labor agreement applies to EOS . . ." Appendix A to Petition, pg. 10.

The *Penntech* and *Hoetger* district courts each resolved Section 301 claims predicated on an alter ego relationship between two ostensibly separate employers without reaching or deciding any representational issues.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be issued by this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

Los Angeles, California
DATED:

Respectfully submitted,

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APPENDIX A.
Opinion.

Filed August 1, 1984
Phillip B. Winberry Clerk,
U.S. Court of Appeals

United States Court of Appeals
for the
Ninth Circuit

No. 83-6144 DC# CV 83-2973-RMT
No. 83-6145 DC# CV 83-3040-RMT

Carpenters' Local Union No. 1478, Petitioner-Appellee,

v.

Neal Stevens, Respondent-Appellant,

Neal Stevens, Plaintiff-Appellant,

v.

Carpenters' Local Union No. 1478;
Southern California Conference of Carpenters,
Defendants-Appellees.

Appeal from the United States District Court for the
Central District of California

Robert M. Takasugi, District Judge, Presiding
Argued and Submitted March 9, 1984
Opinion

Before: Sneed and Boochever, Circuit Judges, and Solomon*, District Judge.

Sneed, Circuit Judge:

Neal Stevens appeals from the district court's enforcement of an arbitration award for $4706.26 in favor of Carpenters' Local Union No. 1478 (union). Stevens contends that the arbitrator's award is inconsistent with

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

earlier findings made by the National Labor Relations Board (the Board) in an election proceeding. We agree, and because the arbitrator's award is contrary to applicable principles of labor law, we reverse.

I.
FACTS AND PROCEEDINGS BELOW

This case arises out of the operation of two entities: EOS Enterprises, Inc. (EOS) and Neal Stevens Contracting (NSC), a sole proprietorship. EOS commenced operations in 1975 and is engaged in the concrete construction business. It is wholly owned by Neal Stevens and his wife, Jean Stevens, and employs an average of four to seven carpenters. The union and EOS have never entered into a collective bargaining agreement. NSC also is involved in the construction business. When NSC began operations in 1977 Stevens signed a memorandum agreement with the union on behalf of NSC that incorporated the master labor agreement between the Southern California General Contractors and the United Brotherhood of Carpenters and Joiners. Apparently this was done to assure that an individual EOS wished to hire as a superintendent would continue to receive union fringe benefits. E.R. 45. In 1980, Stevens executed a second memorandum agreement that incorporated the 1980-83 master labor agreement. The other party to the memorandum agreements was the Southern California Conference of Carpenters, which represents the district councils and local unions of the United Brotherhood of Carpenters and Joiners in eleven southern California counties.

The memorandum agreements generally obligated NSC to comply with the terms of the master labor agreement. Paragraph 9 of the 1980-83 memorandum agreement, about which the parties in this case vigorously dispute, provides:

> This Memorandum Agreement shall be binding upon the heirs, executors, administrators, purchasers and assigns of the Contractor and shall be binding upon the Contractor regardless of a change of entity, name, or association or joint venture and shall bind any entity or venture that is a principal, financially associated with the Contractor.

The master labor agreement required NSC to pay union wages and benefits to its carpenter employees and to employ union carpenters for all work performed by NSC.

On March 2, 1982, the union filed a grievance with a contract adjustment board alleging that NSC had violated provisions of the labor agreements. The grievance arose because EOS, not NSC, had employed non-union carpenters at a jobsite. However, NSC, the union's grievance alleged, "is the alter-ego, single employer, and/or joint venture of EOS." That is, allegedly what EOS had done was done by NSC and vice versa. The Conference of Carpenters on March 11, 1982, sent NSC a letter that noted the pending arbitration regarding "the application of the master labor agreement to EOS, a non-union entity, which is failing to comply with the terms and conditions of the master labor agreement." This letter sought information from NSC pursuant to the National Labor Relations Act in order to proceed to arbitration on the grievance.

In response, EOS filed a petition with the Board on April 2, 1982, seeking a representation election among its carpentry employees. The Conference of Carpenters responded by filing a disclaimer of interest stating that it did not wish to represent the employees of EOS. The Regional Director, however, noted that the union had not withdrawn its March 2, 1982, grievance, and concluded that this action was tantamount to a claim that it represented a majority of the EOS employees. On September

22, 1982, the Regional Director issued his decision directing an election among the carpenters employed by EOS. Two findings underlying this decision are particularly relevant. First, he found that the carpentry workers of EOS were a separate bargaining unit from which he specifically excluded NSC's employees. Second, he found that NSC and EOS were neither alter egos nor joint employers. The union did not seek review of the Regional Director's decision.[1]

Thereafter, the arbitrator, on February 18, 1983, announced her decision and award in which she concluded that her jurisdiction was not affected by the earlier Board proceedings. She reasoned that the Regional Director "did not decide whether NSC, *by virtue of its alleged relationship with EOS*, violated any provisions of the Agreement between NSC and the Union." E.R. 11 (emphasis added). Notwithstanding the previous findings of the Regional Director, the arbitrator held that NSC and EOS "have single employer, alter ego, and joint venture status vis-a-vis each other" and EOS was therefore bound to the terms of the labor agreement. E.R. 12. The failure of EOS to pay union wages and benefits to its employees, was therefore equivalent to non-payment by NSC in violation of the 1980-83 memorandum agreement. The arbitrator accordingly awarded damages totalling $4,706.26. The union sought an order in district court pursuant to

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[1]On April 16, 1982, the union filed unfair labor practice charges alleging that Neal Stevens had violated §§ 8(a)(1) and (5), *see infra* note 5, by refusing to furnish the information requested in the March 11 letter and by refusing to bargain with respect to the employees of EOS. The Regional Director dismissed these charges on June 10, 1983, after he concluded that "the evidence is insufficient to establish that the Employer has any obligation to bargain with respect to the employees of EOS." The General Counsel of the Board denied the union's appeal from the dismissal of the unfair labor practice charges on September 27, 1982.

section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), to confirm the award. Stevens filed a complaint under setion 301 to vacate the award. These actions were consolidated and the district court confirmed the award. Stevens filed a timely notice of appeal.

II
DISCUSSION

At the outset we acknowledge that an arbitrator's factual determinations and legal conclusions generally receive deferential review by the courts, and an award will be upheld so long as it draws its essence from the collective bargaining agreement. *E.g., Broadway Cab Cooperative v. Teamsters & Chauffers Local Union No. 281,* 710 F.2d 1379, 1382 (9th Cir. 1983). Nonetheless, an abritrator's decision forfeits this deference if it violates law or an explicit, well-defined and dominant public policy. *George Day Construction Co. v. United Brotherhood of Carpenters and Joiners,* 722 F.2d 1471, 1477 (9th Cir. 1984); *see Broadway Cab,* 710 F.2d at 1382-85 (reversing award that contradicted Supreme Court precedent and applied incorrect legal standard). Here the arbitrator's award is inconsistent with previous Board findings involving the same parties. Under these circumstances we need not defer and we hold that the district court erred in confirming the award.

A. "Double-Breasted" Operations In General.

This case concerns the circumstances in which the terms of a labor agreement with a signatory company can be applied to employees of a nonsignatory company. This issue frequently arises where, as in this case, a contractor operates one company that is party to a labor agreement and a second company that is non-union. Such "double-breasted" operations allow a contractor to compete for

both union and non-union work.[2] The non-union company can bid competitively on jobs that do not require union contractors, while the union company continues to bid on jobs requiring union contractors. This type of operation is not inherently illegal. Moreover, in particular cases the Board has refused either to require the non-union and nonsignatory company to recognize the bargaining representative of the signatory company's employees or to apply the labor agreement to the employees of the non-union, nonsignatory company. *See, e.g., Local 627, International Union of Operating Engineers v. NLRB*, 595 F.2d 844 (D.C. Cir. 1979); *A-1 Fire Protection, Inc.*, 250 N.L.R.B. 217, 220 (1980), *aff'd on this issue sub nom. Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826 (D.C. Cir. 1982); *Frank N. Smith Associates*, 194 N.L.R.B. 212 (1971); *Gerace Construction, Inc.*, 193 N.L.R.B. 645 (1971).[3]

Unions have resisted the use of double-breasted operations in the construction industry.[4] Understandably, they

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[2]*See, e.g., Local 627, Int'l Union of Operating Eng'rs v. NLRB*, 595 F.2d 844, 845 n.1 (D.C. Cir. 1979); Comment, *Double-Breasted Operations in the Construction Industry: A Search for Concrete Guidelines*, 6 U. Dayton L. Rev. 45 (1981).

[3]Some commentators have criticized the Board's early decisions concerning double-breasted operations for indifference to an employer's intent of avoiding contract obligations under a labor agreement. *See* King & LaVante, *Current Trends in Construction Industry Labor Relations — The Double-Breasted Contractor and the Prehire Contract*, 29 Syracuse L. Rev. 901, 902-28 (1978). This concern may be addressed by the Board's recent use of the "alter ego" doctrine in unfair labor practice cases involving double-breasted operations. *See Infra.*

[4]*Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), illustrates the different means by which unions have opposed double-breasted operations. In what the court characterized as an "all-out assault," *id.* at 497, unions brought claims

would prefer to have the industry completely unionized. One response by unions has been to bring unfair labor practice charges that seek to extend the labor agreement to the employer's non-union operations. Thus, a union will allege that the employer's refusal to apply the agreement to the non-union company violates sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.[5]

B. **The "Single Employer" and "Alter-Ego" Doctrines.**

In evaluating unfair labor practice charges against double-breasted operations, the Board has employed the "single employer" and the "alter ego" doctrines. *E.g., NLRB v. Al Bryant, Inc.*, 711 F.2d 543 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 699 (1984). Under the single employer doctrine, two companies may be bound by a union contract signed by one of them if they are a "single employer" *and* the employers of each constitute a single bargaining unit. *See, e.g., Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81, 82-83 (9th Cir. 1982). The following factors are considered

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under section 301; the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461; and the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1-7, 12-27.

Antitrust claims apparently no longer offer an effective weapon, because in *Associated General Contractors v. California State Council of Carpenters*, 103 S. Ct. 897 (1983), the Supreme Court rejected an antitrust challenge to double-breasted operations on the grounds that the union was not a "person injured" under § 4 of the Clayton Act. Id. at 913.

[5] Section 8(a)(1), 29 U.S.C. § 158(a)(1), provides that "[i]t shall be unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7] of this title."

Section 8(a)(5), 29 U.S.C. § 158(a)(5), provides that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees. . . ."

in determining whether two or more business entities are a single employer: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *E.g., NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). No factor is controlling and all need not be present. *Id.* Similar factors are considered in applying the "alter ego" doctrine. *See NLRB v. Big Bear Supermarkets #3*, 640 F.2d 924, 928 n.5 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980).

The single employer and alter ego doctrines function differently, however.[6] To impose a labor agreement on a nonsignatory company under the single employer doctrine, the employees of both companies must be shown to constitute a single bargaining unit.[7] Such a showing is not

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[6]In *Big Bear Supermarkets*, we observed that the same factors are relevant in determining whether the "single employer" or "alter ego" doctrines apply.

We do not read that case as suggesting that the two doctrines are identical with regard to the application of a labor agreement to a nonsignatory business. As explained *infra*, the alter ego doctrine does not require independent determination of the appropriate bargaining unit, because this doctrine applies in cases in which the non-union entity is a sham attempt to avoid the employer's obligations under a labor agreement. *See also* Anderson, *Suits to Bind Nonsignatories to Collective Bargaining Agreements Under Section 301: The Emerging Federal Law*, 1983 B.Y.U. L. Rev. 241, 248-49 (discussing alter ego doctrine).

[7]We have held that § 301 grants a district court jurisdiction to decide whether employers constitute a single employer, but the bargaining unit determination is a representational question reserved in the first instance to the Board. *California Consolidators*, 693 F.2d at 83-84. In contrast, the Fifth Circuit has held that where the bargaining unit issue is essential to the disposition of contractual rights in a § 301 action, the district court may decide that issue, at least in the absence of a pending or previous decision by the Board. *See Pratt-Farnsworth*, 690 F.2d 521.

required under the alter ego doctrine. It focuses on whether there is an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operation. *See NLRB v. Al Bryant*, 711 F.2d at 550, 553; *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 507-09 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 335 (1983); Comment, *Dual Companies — When Does a Union Have the Right to Expanded Representation*, 12 U.S.F.L. Rev. 89, 94-95 (1977). The alter ego doctrine applies in circumstances in which the bargaining unit of the signatory company is effectively the same as that of the nonsignatory company, Thus, when the alter ego doctrine is applicable we have enforced Board orders applying a labor agreement to a nonsignatory company without requiring a determination regarding the appropriate bargaining unit. *See J. M. Tanaka Construction, Inc. v. NLRB*, 675 F.2d 1029, 1033-35 (9th Cir. 1982).

C. **The Inconsistency Between the Decisions of the Regional Director and the Arbitrator.**

These observations demonstrate the significance of the Regional director's findings in this case. Because the carpentry employees of EOS and NSC do not constitute a single bargaining unit, the single employer doctrine cannot serve to impose terms of the memorandum agreement and the master labor agreement on EOS. And the Regional Director's express finding that NSC and EOS were not alter egos precludes application of the labor agreement to EOS under the alter ego doctrine.

Notwithstanding these findings, the arbitrator concluded that EOS must adhere to the terms of the labor agreement signed by NSC. E.R. 12. The arbitrator found that the evidence submitted by the union established that "NSC and EOS have single employer, alter ego, and joint

venture status vis-a-vis each other." It followed that the labor agreement had been violated because EOS had failed to pay union wages and benefits to its carpentry employees.[8]

The decisions of the Regional Director and the arbitrator are patently inconsistent. To avoid this conclusion, the union argues that the arbitration award rests on a contractual basis. It is here that the importance of the aforementioned Paragraph 9 emerges. The union maintains that it merely seeks contractual damages for NSC's breach of the labor agreement. It does not seek to *represent* the employees of EOS or to *bind* EOS to a labor agreement. This contention ignores the fact that the arbitrator explicitly based the award on the conclusion that EOS was bound by the labor agreement. Moreover, the failure to pay union wages and benefits with respect to EOS employees *is wrongful* only if the labor agreement applies to EOS, and it is applicable only if NSC and EOS are a single employer or EOS is the alter ego of NSC. According to the Regional Director neither is the case. We, therefore, decline to uphold an arbitration award premised on the application of the labor agreement to EOS when previous Board proceedings establish that EOS is not bound by the agreement.[9] In so doing we

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[8]There is no suggestion in the arbitrator's decision or in the union's grievance that Stevens violated the labor agreement because EOS, rather than NSC, performed work on a particular jobsite. The gravamen of the union's complaint is that Stevens has breached the agreement by not applying its terms to the employees of EOS. *Cf. Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 830-31 (D.C. Cir. 1982) (distinguishing claim that labor agreement applied to nonsignatory business from claim that work was illegally transferred to such a business).

[9]The district court relied on different arguments than those now advanced by the union in upholding the award. First, the district court

reject explicitly the proposition that in a double-breasted situation, where neither the alter ego nor the single employer doctrine is applicable, the union business can unilaterally contract to apply the terms of the agreement to the employees of the non-union, nonsignatory business.

D. **The Primacy of the Regional Director's Decision.**

It is obvious that in this case the arbitrator's award impinges on the Board's authority under section 9 of the National Labor Relations Act, 29 U.S.C. § 159. Section 9(b) provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest

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maintained that the arbitrator was not required to give collateral estoppel effect to the Board findings because the election proceeding involved the Conference of Carpenters, a "wholly distinct party" from the union involved in the arbitration. This contention is belied by the fact that the Conference was the representative of the union. Indeed, the union's § 301 claim was based on the labor agreement signed by the Conference on behalf of the union. The district court also stated that the Board findings were not supported by substantial evidence. However, neither the union nor the Conference of Carpenters appealed the Regional Director's decision, and the district court had no jurisdiction to review that decision in a subsequent § 301 suit. *Local #1547, Int'l Bhd. of Elec. Workers v. Local #959, Int'l Bhd. of Teamsters*, 507 F.2d 872, 874-75 (9th Cir. 1975).

The district court's final argument was that "the arbitrator's decision was not inconsistent with the NLRB's bargaining union determination in that the arbitrator was not called upon to determine the ultimate validity or invalidity of the relevant terms of the collective bargaining agreement, but merely was asked to apply and interpret said terms with regard to the grievance filed." E.R. 20. This statement does not alter the fact that the arbitrator's conclusion that the terms of the labor agreement apply to EOS is fundamentally inconsistent with the Board's findings. *Cf. Associated Gen. Contractors v. International Union of Operating Eng'rs*, 529 F.2d 1395, 1397-98 (9th Cir.) (§ 301 action not precluded by Board ruling where former not inconsistent with latter), *cert. denied*, 429 U.S. 822 (1976).

freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof." 29 U.S.C. § 159(b). This section confers broad discretion on the Board to determine appropriate bargaining units, and a reviewing court will defer to the Board's determination unless it is arbitrary or capricious. *See, e.g., Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1037 (9th Cir. 1978). Because the bargaining unit determination is a representation question reserved in the first instance to the Board, we have held that a district court does not have jurisdiction to address this question in a section 301 suit. *California Consolidators*, 693 F.2d at 84.[10]

Notwithstanding section 9(b)'s delegation of authority to the Board, certain representational issues can be the subject of arbitration. In *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), for example, a union sued to compel arbitration of a claim that the employer was improperly allocating work to members of another union. The employer refused to arbitrate on the grounds that the controversy involved a representation matter within the exclusive jurisdiction of the Board. *Id.* at 262. The Court held that although the dispute involved representational issues, it could be the subject of arbitration. *Id.* at 268, 272. Arbitration "is proper, even though an alternative remedy before the Board is available, which, if invoked by the employee will protect him." *Id.* at 268. More importantly for our purposes, the Court observed that if the Board subsequently disagreed with the arbitrator's decision, "the Board's ruling would, of course, take precedence . . ." and "[t]he superior authority of the Board may be invoked at any time." *Id.* at 272.

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[10] *See supra* note 7.

Thus, *Carey* indicates that, while the possibility of a subsequent decision by the Board does not prevent arbitration of certain representational issues in a section 301 proceeding,[11] where the findings of the Board and an arbitrator conflict on a particular issue, the Board's decision must take precedence. We so held in *Cannery Warehousemen, Food Processors, Drivers and Helpers v. Haig Berberian, Inc.*, 623 F.2d 77 (1980). There an arbitrator found that a new processing plant was subject to a labor agreement that applied to the employer's other facilities. The Board subsequently found, however, that the new plant was not covered by the existing labor agreement, and the employees at that plant later voted against unionization. Relying on *Carey*, we affirmed the district court's refusal to affirm the award by noting that the Board's decision takes precedence over the arbitrator's decision. *Id.* at 81. *See also Local 7-210, Oil, Chemical and Atomic Workers v. Union Tank Car Co.*, 475 F.2d 194, 199 (7th Cir.), *cert. denied*, 414 U.S. 875 (1973); *New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755, 767-68 (5th Cir. 1966). The same must be true here. The Regional Director's findings must take precedence over the arbitrator's decision.

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[11]This fact may seem anomalous inasmuch as district courts lack jurisdiction over representational issues under the Board's jurisdiction in § 301 cases in which the labor agreement does not provide for arbitration. The anomaly results, however, from our need to reconcile *Carey* with the Supreme Court's holding in *South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Engr's*, 425 U.S. 800 (1976) (per curiam), that courts may not foreclose the Board from deciding the appropriate bargaining unit in the first instance. *See Ketchikan*, 611 F.2d at 1298-1300. A persuasive argument can be made that it is even less appropriate for arbitrators than for courts to decide representational issues within the Board's primary jurisdiction. *See* Comment, *Arbitration of Representational Issues: A Critique of Carey*, 1983 B.Y.U. L. Rev. 349.

This conclusion precludes a variance in the employer's obligations under the labor agreement merely because the arbitrator's decision arises in the context of a section 301 proceeding instead of a Board proceeding. The primacy of the latter type of proceeding is suggested by *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). There a union, in a suit under section 301 seeking to bind a successor employer to a labor agreement signed by the predecessor employer, argued that the successor was bound to arbitrate concerning its obligations under the previous employer's labor agreement. The Court held that the successor was not required to arbitrate because it had not explicitly or implicitly assumed the agreement to arbitrate and because there was no substantial continuity of identity in the workforce. *Id.* at 264-65. *Howard Johnson* relied on the earlier decision in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), in which the Court rejected the Board's position that national labor policies require a nonsignatory successor employer to assume its predecessor's collective bargaining agreement. The important point for our purposes is that the Court expressly noted that even though *Burns* arose in the context of an unfair labor practice case, the principles it recognized must be taken into account in the section 301 context. 417 U.S. at 256. *Cf. Pratt-Farnsworth*, 690 F.2d at 510-11 (substantive law developed by Board and federal appellate courts in unfair labor practices cases should apply in section 301 suit against related employers). In this case we conform to the principles of *Howard Johnson* by refusing "to permit the rights and obligations of the parties to vary with the forum." *Id.* at 513; *cf. Howard Johnson*, 417 U.S. at 262 ("The union's effort to circumvent [the *Burns*] holding by asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted.").

E. Protection of Rights of Employees of EOS.

Finally, our holding prevents an infringement upon the rights of the employees of EOS. The clear effect of the arbitrator's decision would be to apply the terms of the NSC labor agreement to the EOS carpenters. Section 7 of the National Relations Act provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities.

29 U.S.C. § 157.

The rights guaranteed employees by section 7 cannot be limited by contract between a union and an employer. *See, e.g., Local 3-193, International Woodworkers v. Ketchikan Pulp Co.*, 611 F.2d 1295, 1301 (9th Cir. 1980); *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352, 1357 (9th Cir. 1970). Paragraph 9 of the agreement signed by NSC cannot be permitted to limit the rights of the EOS employees. This position is supported by *Florida Marble Polishers Health & Welfare Trust Fund v. Edwin M. Green, Inc.*, 653 F.2d 972 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982). There a union brought suit under section 301 seeking to recover benefit contributions on the grounds that a labor agreement applied to a non-signatory, non-union operation. *Id.* at 974-75. The Fifth Circuit rejected this argument by noting that the parties to the labor agreement could not usurp the self-determination rights of the non-union entity's employees. *Id.* at 976-77. Consequently, the court refused to require either the union or the non-union business to pay damages for the failure to make benefit contributions for the employees of the nonsignatory operation. *Id.* at 977.

The strength of this position is enhanced when it is recognized that to hold otherwise would confront employers in Stevens' position with a serious dilemma.[12] Should he refuse to apply the terms of the labor agreement to the non-union carpenters, he would be liable for damages under an approach that accorded primacy to the arbitrator's decision. On the other hand, should he insist on applying the agreement to those workers in face of the Board's findings in the election proceedings, the employer would be liable for having committed an unfair labor practice. *See Sheraton Kauai Corp.*, 429 F.2d at 1354 (employer committed unfair labor practice by extending labor agreement to bargaining unit Board identified as distinct); *Welch Scientific Co. v. NLRB*, 340 F.2d 199, 203 (2d Cir. 1966) (unfair labor practice for employer to apply agreement covering Chicago plants to employees in New York).

Our approach avoids this dilemma and protects the section 7 rights of employees in the position of those of EOS. Enforcement of the award would not serve these

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[12]In *Carey*, the Supreme Court suggested in dicta that this outcome would not occur even though certain representational issues are subject to arbitration. Alfter noting that a subsequent Board decision would take precedence over a conflicting ruling by an arbitrator, the Court added: "if the employer's action had been in accord with [the Board's] ruling, it would not be liable for damages under § 301." 375 U.S. at 272. The Courts of Appeals have followed the suggestion in *Carey*. *See, e.g., Pilot Freight Carriers v. International Bhd. of Teamsters*, 659 F.2d 1252, 1258 (6th Cir. 1981) (subsequent Board decision protected employer from enforcement of arbitration awards in accretion controversy); *Local 7-210, Oil, Chemical and Atomic Workers v. Union Tank Car Co.*, 475 F.2d 194, 197-99 (7th Cir.) (refusing to enforce arbitrator's damage award that was inconsistent with subsequent Board determination), *cert. denied*, 414 U.S. 875 (1973); *cf. International Union of Operating Eng'rs v. Sullivan Transfer, Inc.*, 650 F.2d 669, 677 (5th Cir. 1981) (union may not recover damages in § 301 suit to extent award is repugnant to Board's § 10(k) jurisdictional determination).

ends. Therefore, we reverse the district court and remand the case with instructions to vacate the arbitrator's award.

REVERSED and REMANDED.

Filed Aug. 1, 1984. Phillip B. Winberry, Clerk, U.S. Court of appeals, *Carpenters' Local Union No. 1478 v. Stevens*, Nos. 83-6144/45.

BOOCHEVER, Circuit Judge, dissenting.

There is no dispute that this case involves a construction industry prehire agreement under section 8(f) of the NLRA. Prehire contracts authorized by section 8(f) are unique. They may be entered between a union and an employer without the union's majority status first having been established. Monetary obligations accrued under a prehire agreement prior to repudiation of the agreement by the employer, can be enforced in a section 301 suit even in the absence of proof the union represented a majority of the employees. *Jim McNeff, Inc. v. Todd*, 103 S. Ct. 1753 (1983).

Because the parties did not address the effect of the prehire status of the agreement, my first choice would be to request further briefing. Since the majority does not agree, I shall express my views without the benefit of such briefing.

I believe that an entirely different analysis from that of the majority is required because of the section 8(f) prehire agreement. The monetary obligations involved accrued prior to any attempt to repudiate the prehire agreement. Thus, there was no need for the arbitrator to delve into representational issues such as whether the union represented a majorty of the employees in an appropriate unit. *See Jim McNeff, Inc. v. Todd*, 103 S. Ct. at 1753.

The basic issue with which we are confronted is whether the NLRB has exclusive jurisdiction to determine whether EOS Enterprises Inc. (EOS) is bound by the pre-hire agreement executed by Neal Stevens Contracting (NSC), a sole partnership. The majority's result conflicts with *Roberts v. Ayala*, 709 F.2d 520 (9th Cir. 1983) (per curiam). In *Roberts*, this court held that a district court has jurisdiction under section 301 of the NLRA to determine whether one company is bound to a prehire agreement signed by another company when it is alleged that the two companies constitute a single employer. *Id.* The institutional competence of an arbitrator and of a district court in a section 301 suit to decide the issue involved in this case are similar. *See United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). Whether an employer is bound to a prehire agreement under a single employer theory is primarily a contractual, not a representational issue. *Roberts v. Ayala*, 709 F.2d at 521. There is, therefore, no reason to presume the NLRB inherently more competent to decide the dispute.

Nor was the arbitrator precluded from determining that the two companies constituted a single employer by the doctrine of collateral estoppel. An NLRB finding has collateral estoppel effect only if it is essential to the Board's judgment and was a necessary determination of an issue which was actually litigated. *See Glaziers & Glassworkers Local 767 v. Custom Auto Glass Distributors*, 689 F.2d 1339, 1341 (9th Cir. 1982); *In re Duncan*, 713 F.2d 538, 541 (9th Cir. 1983). Mere opportunity to litigate an issue is insufficient. 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.443[3] (2d ed. 1983). The Regional Director's finding on the single employer issue was made as part of his determination of the appropriate bargaining unit. The union disclaimed any interest in representing EOS employees and took no position on the appropriate unit. Thus, there has been no

actual adversary litigation of the single employer issue and the Regional Director's finding should not be given collateral estoppel effect. Moreover, because significantly different legal issues were involved in the two proceedings, it is questionable whether the Regional Director's finding would be entitled to collateral estoppel effect even if there had been actual litigation of the issue. *See Metropolitan Detroit Bricklayers District Council v. J. E. Hoetger & Co.*, 672 F.2d 580, 583-84 (6th Cir. 1982) (NLRB's finding of single employer status in unfair labor practice proceeding not entitled to collateral estoppel effect in subsequent 301 suit, because Board had no authority to decide if parties were liable for violation of collective bargaining agreement).

Because the arbitrator's award draws its essence from the collective bargaining agreement, *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. at 597, I would affirm the district court.[1]

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[1]On the merits of the dispute it seems ironic that NSC, which now seeks to dissassociate itself from EOS, entered into the union agreement to confer union fringe benefits on a superintendent employed by EOS.

APPENDIX B

Modified Opinion

FILED Oct. 4, 1984, Phillip B. Winberry, Clerk, U.S. Court of Appeals, No. 83-6144, No. 83-6145 Carpenters' Local Union No. 1478, Petitioner-Appellee, v. Neal Stevens, Respondent-Appellant. Neal Stevens, Plaintiff-Appellant. v. Carpenters' Local Union No. 1478; Southern California Conference of Carpenters, Defendants-Appellees. ORDER. Before: Sneed and Boochever, Circuit Judges, and Solomon*, District Judge.

The panel in this case had voted to modify the opinion, heretofore filed on August 1, 1984, as follows:

Page 4, lines 17-18: Delete the sentence: "The union did not seek review of the Regional Director's decision." and replace it with: "The union did not seek review of these two findings."

Page 16, Footnote 1: Insert new paragraph starting at line 9, as follows:

> "On September 30, 1982, the union requested Board review of the Regional Director's decision directing an election among the carpenters employed by EOS. The union only sought review of the Regional Director's determination that the union's grievance action was inconsistent with its disclaimer. On October 20, 1982, the Board granted the union's request. However, EOS's petition for a representation election was withdrawn on August 10, 1984 and the case was closed."

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Page 17, Footnote 9: Insert new paragraph before line 25, as follows:

> "The union did not challenge the Regional Director's finding that NSC and EOS were neither alter egos nor joint employers. The union cannot relitigate this issue in any related subsequent unfair labor practice proceeding. *See* 29 C.F.R. § 102.67(f) (1983)."

With such modifications, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court had been advised of the suggestion for en banc rehearing, and no judge of the court had requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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CLERK

(2)

No. 84-1019

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CARPENTERS' LOCAL UNION No. 1478
Petitioner,
VS.
NEAL STEVENS,
Respondent.

NEAL STEVENS,
Respondent
VS.
CARPENTERS' LOCAL UNION No. 1478;
SOUTHERN CALIFORNIA CONFERENCE
OF CARPENTERS,
Petitioners.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Are unit determinations irrelevant in cases involving construction industry prehire agreements?

(2) If unit determinations are relevant in such cases, can an arbitrator ignore or overrule a unit determination of the National Labor Relations Board?

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No. 84-1019

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CARPENTERS' LOCAL UNION NO. 1478
Petitioner,

VS.

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NEAL STEVENS,
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VS.

CARPENTERS' LOCAL UNION NO. 1478;
SOUTHERN CALIFORNIA CONFERENCE
OF CARPENTERS,
Petitioners.

BRIEF IN OPPOSITION

Respondent, Neal Stevens, prays that the petition for a writ of certiorari to review the decision issued on August 1, 1984 and modified on October 4, 1984, by the U. S. Court of Appeals for the Ninth Circuit be denied. The decision of the Court of Appeals is officially reported 743 F.2d 1271.

STATEMENT OF THE CASE

E.O.S. Enterprises, Inc. (hereinafter "E.O.S.") began business in 1975 and currently employs 30 employees. E.O.S. is wholly owned by Neal Stevens and his wife, Jean Stevens. No history of collective bargaining exists between the Carpenters Union and E.O.S. In 1977 E.O.S. desired to hire a superintendent who requested that E.O.S. pay union fringe benefits on his behalf. E.O.S. could not pay fringe benefits for this superintendent as E.O.S. did not have a contract with the Union. However, a business agent for Carpenters' Local 1140 arranged for Neal Stevens Contracting, a sole proprietorship, to enter into a prehire agreement with the Union. This arrangement also permitted Neal Stevens Contracting (hereinafter "NSC") to carry the superintendent on its payroll. As a result of this agreement, NSC executed a Union Memorandum Agreement on December 21, 1977, which incorporated the 1977 to 1980 Master Labor Agreement. In 1980, Stevens executed a second Memorandum Agreement incorporating the 1980-1983 Master Labor Agreement.

On March 2, 1982, the Union filed a grievance against NSC. On March 11, 1982, the Union sent a letter to Neal Stevens noting the pending arbitration regarding "the application of the Master Labor Agreement to E.O.S., a nonunion entity, which is failing to comply with the terms and conditions of the Master Labor Agreement." In this letter, the Union sought, pursuant to the National Labor Relations Act, information from Neal Stevens necessary to the arbitration proceeding.

On April 2, 1982, E.O.S. filed a petition with the National Labor Relations Board (hereinafter "Board") seeking an election among its carpentry employees in order to determine whether the employees desired representation by the Carpenters' Union. Issues of single employer or alter ego

status, and appropriate unit issues, were litigated in the Board proceedings. In directing an election, the Regional Director specifically found that E.O.S. and NSC were neither joint employers nor alter egos. The Regional Director additionally found that employees of NSC and E.O.S. did not constitute a single bargaining unit.

Despite the Board's determination, an arbitrator found a single employer/alter ego relationship between E.O.S. and NSC, and held that both entities were bound to the agreement. The Union sought enforcement of the award, pursuant to Section 301 of the Labor Management Relations Act [29 U.S.C. § 185(a)], (hereinafter "Act"), in district court, NSC filed a complaint under Section 301 to set aside the award. The district court confirmed the award on grounds not raised by the Union. The Court of Appeals then reversed the district court decision based on the supremacy of the Board determination that the employees of E.O.S. and NSC did not constitute a single bargaining unit.

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

The Court of Appeals based its decision on hornbook law, that a collective bargaining agreement cannot bind a non-signatory employer unless, *inter alia*, the employees of both employers constitute one bargaining unit. *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976).

The bargaining unit determination is within the province of the Board. Once the Board makes a unit determination, its decision takes precedence over unit determination made in arbitration. *Carey v. Westinghouse*, 375 U.S. 273 (1964). Thus, in the present case, because the Board determined that E.O.S. and NSC's employees did not constitute a single

bargaining unit, the Court of Appeals correctly held that E.O.S. could not be bound to NSC's agreement.

Petitioner has continually sought to ignore the Board's unit determination and argues that this Court in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983), in effect, ruled that unit determinations are not relevant in construction industry prehire agreements. To the contrary, this Court in *McNeff* continually spoke of "relevant units" throughout its decision. Furthermore, this Court in *McNeff* cited its earlier *Higdon* decision, which also made reference to relevant units in construction prehire agreements. Finally, this Court's landmark decision in the *Peter Kiewit* decision which dealt directly with appropriate unit issues, involved a construction industry "dual shop" case.

This Court in *McNeff* stated that the enforcement of prehire agreements does not affect the right of employees to select their bargaining representative. A unit determination was not directly in issue before the Court in *McNeff*. If petitioner's argument is granted, and unit determinations are irrelevant in prehire cases, then enforcement of prehire agreements could indeed preclude employees from choosing their bargaining representative. Where the Board designates separate bargaining units in an election proceeding, a grouping of employees are excluded from participating in the election. If a union could nevertheless ignore the unit determination and enforce an agreement over an expanded unit through its grievance arbitration proceedings, the contract could affect disenfranchised employees who would be powerless to negate the union's minority representation.

Additionally, petitioner's reliance on *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983) and *Metropolitan Detroit Bricklayers District Council, International Union of Bricklayers v. J. E. Hoetger & Co.*, 672 F.2d 580 (6th Cir. 1982) is misplaced. These cases involve factual and

procedural patterns which are distinctly dissimilar to the factual and procedural patterns in the present case. There is no split in the circuits. No circuit has enforced an agreement against a non-signatory in a dual shop case when the Board has determined that separate units exist.

ARGUMENT

I

CONTRARY TO PETITIONER'S POSITION, THIS COURT IN JIM McNEFF, INC. v. TODD, 461 U.S. 260 (1983) REINFORCED PRIOR DECISIONS OF THIS COURT THAT UNIT DETERMINATIONS ARE RELEVANT TO CASES INVOLVING CONSTRUCTION INDUSTRY PREHIRE AGREEMENTS.

In *Jim McNeff, Inc. v. Todd,* 461 U.S. 260 (1983), the employer executed a Section 8(f) agreement, a "prehire" agreement, with the union. The employer, however, failed to make the monthly trust fund payments required by the agreement. The union sought enforcement of the prehire contract terms through a Section 301 suit. The Court in *McNeff* held that a Section 301 suit was a proper manner of enforcing the terms of a prehire contract against a signatory to the contract. *Id.* at 271. In reaching the above conclusion, the Court also held that enforcement of a prehire contract pursuant to a Section 301 suit, "does not impair the rights of employees to select their own bargaining agent." *Id.* at 269. The facts of the instant case, however, clearly differ from those of *McNeff.* In the present case, unlike *McNeff,* the petitioner seeks to enforce a prehire contract against an entity which has not signed the prehire contract. Therefore, petitioner's characterization of the question presented as whether the Court of Appeals misinterpreted *McNeff* in reaching its decision is misleading.

There is no issue concerning "repudiation" or majority status in this case. No one is concerned with whether an election was held or who won any such election. The question concerns what grouping of employees are affected by the agreement, whether it be a prehire agreement or a traditional majority based agreement.

The issue is actually whether or not unit determinations are relevant in cases involving prehire agreements in the construction industry. Petitioner has continually sought to ignore the Board's unit determination that the carpentry employees of E.O.S. and the carpentry employees of NSC constitute separate units. This was the basis of the decisions by the court below. Such unit determinations have traditionally been labelled "representational" issues by both the National Labor Relations Board and this Court. By seizing on this Court's statement in *McNeff* that enforcement of prehire agreements does not infringe on the right of employees to select their own bargaining representative, petitioner attempts to blindly void all "representational" issues in construction industry agreements — including unit determination issues.

However, this Court's decision in *McNeff*, as well as this Court's decision in other construction industry cases, defeats petitioner's broad, simplistic argument. Even in *McNeff*, this Court acknowledged that unit determination issues exist in prehire agreement cases. This Court stated:

> Whatever may be required of a party wishing to exercise its undoubted right to repudiate a prehire agreement before the union attains majority support *in the relevant unit*, ...

Jim McNeff, Inc. v. Todd, 461 U.S. at 270 (Emphasis added).

This Court also stated:

> However, the monetary obligations of ... may be recovered in a § 301 action brought by a union prior to the repudiation of the contract, even though the union has not attained majority support *in the relevant unit.*

Id. 271-72 (Emphasis added).

Furthermore, this Court in *McNeff* cited its earlier decision in *NLRB v. Local 103, International Association of Bridge Workers (Higdon)*, 434 U.S. 335 (1978), which involved a construction industry prehire agreement, by stating:

> In accord with this intention, we approve the Board's conclusion that a 'prehire agreement is voidable' 'until and unless [the union] attains majority support *in the relevant unit.*'

Jim McNeff, Inc., 461 U.S. at 269 (quoting *Higdon*, 434 U.S. at 341) (Emphasis added).

Finally, as noted *infra*, this Court delivered the landmark decision requiring unit determinations in cases where a collective bargaining agreement of one entity is sought to be applied to another entity, in the case of *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1977). The *Peter Kiewit* decision was a construction industry case.

Clearly, petitioner's attempt to render meaningless unit determinations in construction industry prehire agreement cases, and to divest the authority of the National Labor Relations Board to make such determinations, is unwarranted.

II

THE NATIONAL LABOR RELATIONS BOARD'S DETERMINATION THAT NEAL STEVENS CONTRACTING AND E.O.S. DO NOT HAVE THE SAME BARGAINING UNIT PRECLUDES E.O.S. FROM BEING BOUND TO NEAL STEVENS CONTRACTOR'S PREHIRE AGREEMENT.

In *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976), the union contended that South Prairie violated Sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to apply Peter Kiewit's collective-bargaining agreement to its, South Prairie's, employees.

Initially, the National Labor Relations Board (hereinafter "Board"), concluded that South Prairie and Kiewit were separate employers; therefore, the Board dismissed the union's complaint. On review, the Court of Appeals for the District of Columbia held that Kiewit and South Prairie were a single employer. The Court of Appeals then concluded that the agreement therefore bound both companies. By making this decision the Court of Appeals, by implication, concluded that the employees of Kiewit and South Prairie constituted a single, over-all appropriate unit under Section 9 of the Act for purposes of collective bargaining. In reviewing the Court of Appeals' decision, this Court concluded that the Court of Appeals' determination with respect to the bargaining unit issue constituted error. This Court held that such unit determinations must first be decided by the Board. Therefore, *Peter Kiewit* not only stands for the proposition that determination of a bargaining unit is within the Board's province, but also stands for the proposition that a non-signatory cannot be bound to an agreement unless there is a

finding that (1) both employers constitute a single employer, joint employer or alter ego, and (2) one overall bargaining unit is appropriate for both employers.

The Ninth Circuit adopted the *Peter Kiewit* test in Section 301 litigation in *Local 3-193 v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980). In *Teamsters, Local 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982), the Ninth Circuit reaffirmed its holding in *Ketchikan* stating:

> [T]hat two companies have been designated a single employer . . . is not determinative as to whether both are bound by a union contract signed by one of them. This requires that the employees of each constitute a single bargaining unit.

California Consolidators, Inc., 693 F.2d at 83 (quoting *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 386 (9th Cir. 1979)).

Thus, clearly before E.O.S. can be bound to NSC's prehire agreement E.O.S. and NSC must both constitute a single employer and/or alter ego and their employees must constitute a single bargaining unit. The Regional Director, however, in directing an election among the carpentry employees of E.O.S., made a specific finding that E.O.S. and NSC were separate employers and that the carpentry employees of E.O.S. were a distinct and "separate bargaining unit" from NSC's employees.

A. The Board Determination With Respect to a Bargaining Unit Takes Precedence Over the Arbitrator's Finding.

In *Carey v. Westinghouse*, 375 U.S. 261 (1964), the Court stated:

> Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the con-

> troversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accordance with that ruling it would not be liable for damages under § 301.

Id. at 272.

First of all, in holding that E.O.S. was bound to NSC's bargaining agreement, the arbitrator, by necessary implication, determined that E.O.S. and NSC's employees constituted one unit. The District of Columbia circuit made the same implied finding in the *Peter Kiewit* decision when it applied an agreement to a non-signatory based on its decision that two entities constituted a single employer.

As stated earlier, the Regional Director, in addition to finding that no single employer or alter ego relationship existed, found that the employees of these two entities were not in a single unit. Thus, the arbitrator's decision and the Board's decision are patently inconsistent. Therefore, pursuant to *Carey v. Westinghouse*, the Board decision with respect to the unit determination takes precedence over the arbitrator's.

B. No Conflict Exists Among the Circuits With Respect to the Board's Supremacy in Making Unit Determinations.

As this Court stated in *Peter Kiewit:*

> [T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final is rarely to be disturbed. . . .'

Peter Kiewit, 425 U.S. at 805 (quoting *Packard Motor Company v. NLRB*, 330 U.S. 485, 491 (1947)).

The circuits have consistently followed the above edict announced in *Peter Kiewit* in Section 301 actions. The

court below in *Local 3-193, International Woodworkers of America v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980) stated:

> This declaration of the strong policy of judicial deference to initial determination by the NLRB of representation issues is equally applicable to actions under Section 301. In the present case the Union is attempting an end-run around Section 9 of the Act and under the guise of contract interpretation wants to avoid . . . determination of an appropriate bargaining unit by the NLRB, which has primary authority in this area. This cannot be countenanced.

Id. at 1299-1300.

The issues of the present case are strikingly analogous to those of *Ketchikan*. In the instant case, the Board decided that the employees of the two employers were not a single unit. The Union then "attempted an end-run" around the Board's determination by adjudicating this issue in the arbitration forum. An attempt to avoid the Board's authority could not be countenanced in *Ketchikan*, and it cannot be countenanced in the present case.

Furthermore, in *Teamsters, Local 70 v. California Consolidators*, the court stated:

> [T]hat two companies have been designated a single employer . . . is not determinative as to whether both are bound by a union contract signed by one of them. This requires that the employees of each constitute a single bargaining unit.

Id. at 83 (quoting *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 386 (1979)).

There is a split in the circuits which is not germane to this matter. The Ninth Circuit, in *Ketchikan* and *California Consolidators*, has held that in cases originating before

the district court in Section 301 litigation, the district court cannot make a determination that two entities are bound to a single agreement because this would invade the Board's province of making unit determinations. The Fifth Circuit, in *Carpenters, Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982), held that in such district court litigation under Section 301, the district court was empowered, in the absence of a Board determination, to make a unit determination. However, even here, the Fifth Circuit noted that its decision would be different if the Board had previously made the unit determination.

In *Pratt-Farnsworth*, no party had sought certification or clarification of the relevant bargaining unit before the Board. *Id.* at 515. The Court of Appeals stated that if either of the parties had sought Board review of the unit determination issue, "our view of the proper role of the federal district court in that case might be very different." *Id.* at 515. The court also stated:

> We do not deny that deference to the expertise of the Board in unit determinations should be encouraged whenever possible, and upon the initiation of clarification proceedings or the filing of an unfair labor practice by one of the parties to the this action, depending upon how far these proceedings had progressed, the wisest course for the district court might well be to stay the action pending the Board's resolution of the unit issue.

Id. at 515.

Therefore, both the Ninth Circuit and the Fifth Circuit agree that unit determinations are relevant and that Board determinations on such issues are paramount.

In the instant case, there has been a Board unit determination. There has never been any decision by any court

of appeals binding two entities to one agreement when there exists an adverse Board unit determination. There is simply no split in the circuits relevant to this case.

III

PETITIONER IS PRECLUDED FROM USING ARBITRATION IN A SECTION 301 ACTION TO REVIEW THE UNIT DETERMINATION ISSUE AS IT FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

After the Regional Director determined that E.O.S. and NSC's employees did not constitute a single unit, petitioner failed to file a request for review of this issue. In *Local 1547 v. Local 959*, 507 F.2d 872 (9th Cir. 1974), the Ninth Circuit recognized that when a union does not request review of a Regional Director's decision pursuant to Section 102.67 of the Board's Rules and Regulations, Series 8 as amended, it cannot attack the findings at a later time. *Id.* at 874-75. Therefore, since the Union failed to request review on the relevant issues the arbitrator's unit determination and the resulting Section 301 action should not be permitted.

IV

THIS COURT IN JIM McNEFF, INC. v. TODD, DID NOT RENDER UNIT DETERMINATIONS AND OTHER "REPRESENTATIONAL" ISSUES IRRELEVANT IN PREHIRE AGREEMENTS.

This Court, in *McNeff*, held that the enforcement of a prehire agreement against the signatory employer did not inhibit the right of employees to determine their representative status with the union. They are still free to petition the Labor Board at any time pursuant to the proviso to Section 8(f). The employer is also free to repudiate the agreement at any time prior to the union ob-

taining majority status in a permanent and stable unit. Petitioner in this case is attempting to expand this rationale to prohibit any issue concerning "representation" matters from being heard in cases involving prehire agreements. The logic of petitioner is that unit determinations are labelled "representational" and therefore should not be considered in prehire agreements which are, according to petitioner, not "representational." Petitioner's argument is, therefore, based on terminology rather than substance.

It should be noted that petitioner is distorting the use of the general term "representational." Representational issues, decided by the Board involve a wide variety of issues, including the actual casting of ballots in a Board election.

It should be noted in this case that we are not concerned with who won or who did not win a Board election. What is in issue is the unit determination made in that "representation" proceeding. It should also be noted, that the Board makes unit determinations even in cases where there will be no election or casting of ballots. Even in such cases, unit determinations are broadly labelled "representational" issues.

For example, this case first arose before the Regional Director on a "representation" petition seeking an election. However, such issues also arise before the Board in "unit determination" petitions. Both of these types of petitions arise under Section 9 of the National Labor Relations Act and cover issues which are broadly referred to as "representational." Indeed, Section 9 is entitled "Representatives and Elections," and under Section 9(b) the Board has authority to determine "the unit appropriate for the purposes of collective bargaining. . . ."

When petitions are filed seeking an election, the Board requires a "question concerning representation." However,

under Section 102.60(b) of the Board's Rules and Regulations, Series 8 as amended, the Board provides:

> A petition for clarification of an existing bargaining unit or a petition for amendment of certification, *in the absence of a question concerning representation,* may be filed by a labor organization or by an employer.

Therefore, unit determinations can be made even in the absence of a question concerning representation. In such a unit determination petition, an election will not be directed. Nevertheless, this Court, in *Peter Kiewit,* and the Board, have broadly labelled unit determinations as representational.

Petitioner's cry that it is not seeking "representation" is therefore irrelevant. The underlying unit determination is nevertheless controlling, regardless of its topical labeling.

Furthermore, unit determinations are relevant in Section 8(f) cases because they can affect the grouping of employees that are affected by a union's contract and the union's representation through the contract. A signatory union is a representative of the employees of the employer, whether it be a majority representative or a Section 8(f) minority representative. A unit determination is necessary to see which employees are affected by such representation and the agreement. In *Los Angeles Bldg. & Constr. Trades Council (Donald Schriver, Inc.),* 239 NLRB 264, *aff'd,* 635 F.2d 859 (CA DC 1980), *cert. denied,* 451 U.S. 976 (1981), the Board stated:

> An 8(f) collective-bargaining relationship may be more vulnerable to disruption than a 9(a) relationship because inquiry may be made into the union's majority status during the term of the contract. Nevertheless, under an existing 8(f) relationship, the union party to the 8(f) contract is the lawful representative of the employees covered by the contract. As their represen-

> tative such union has an interest in restricting subcontracting in order to protect continuity of work and fringe benefits for the employees and to insure more stable and harmonious jobsite relations to the same extent a 9(a) representative has.

Donald Schriver, Inc., 239 NLRB at 270.

It should be noted that if Board unit determinations can be ignored in prehire agreements, various employees which could be affected by the agreement could actually be precluded from voting on the status of the union. For example, if the Board determines separate units are appropriate in an 8(f) case, a group of employees would be precluded from voting. These same employees may not want to be governed by the 8(f) agreement and seek to insure such an agreement ceases to exist. Nevertheless, despite the unit determination and their disenfranchisement, the union could continue to apply the agreement to the employees through the union's internal grievance procedures if petitioner's argument is adopted.

V

PETITIONER'S CLAIM OF A CONFLICT IN THE CIRCUITS IS INCORRECT.

In *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983), the employers sought to collaterally estop the Board from making a single employer determination as the district court, in an earlier proceeding, had found that the two employers was not alter egos. *Id.* at 23. The Court of Appeals concluded that the Board could not be precluded from making the single employer decision as in the Board proceeding — §§ 8(a)(5) and (a)(1) charges — the question was whether the employers were a single employer, whereas, in the Section 301 contract action the question was whether the employers were alter egos. Thus, the two proceedings

lacked sufficient identity of issues to invoke collateral estoppel.

In *Metropolitan Detroit Bricklayers District Council, Int'l. Union of Bricklayers v. J. E. Hoetger & Co.*, 672 F.2d 580 (6th Cir. 1982), cited by petitioner, general contractor Hoetger subcontracted masonry work to Hawkins. The subcontracting provision required (1) that Hawkins employ only workers affiliated with the union, and (2) that Hawkins assume exclusive liability for paying all benefits. Hawkins failed to pay the fringe benefits, and then went out of business. The union picketed Hoetger. Consequently, Hoetger filed Section 8(b)(4)(i) and (ii)(B), 29 U.S.C. § 158(b)(4)(i) and (ii)(B) (1976), secondary boycott unfair labor practice charges against the union. The Board ruled that the union had not violated the above sections, because Hoetger and Hawkins were joint employers within the meaning of the secondary boycott provisions of the Act.

Next, the union brought a Section 301 action alleging that Hoetger and Hawkins comprised a single employer, and that the employers violated the collective bargaining agreement. The union sought collateral estoppel of the Board's joint employer finding in the unfair labor practice secondary boycott proceeding. The Court of Appeals refused to invoke collateral estoppel because the issues before the two forums were not the same.

The court based its decision on the premise that the joint employer resolution in a secondary boycott matter is different than a joint employer resolution in a "dual shop" case.

However, the instant case, unlike *Hoetger* involves a unit determination by the Regional Director. Furthermore, a unit determination is a necessary element in both proceedings. As stated previously, unit determinations are within the province of the Board. Thus, once the Board resolves the unit determination issue, the Board's finding must take

precedent over an arbitrator's determination. Therefore, unlike *Hoetger*, one of the common issues in each case is the same. And, unlike *Hoetger*, this Court and the circuits are in unanimous agreement that unit determinations are best decided by the Board in Section 9 proceedings.

VI

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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